Filed 10/19/09 In re A.T. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re A.T., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. R.B., Defendant and Appellant.	C060241 (Super. Ct. No. JD226315)

R.B., father of the minor minor A.T., appeals from an order of the juvenile court maintaining an existing no-visitation order. (Welf. & Inst. Code, § 366.21, subd. (h) [all further undesignated statutory references are to this code].) We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 2007, the Sacramento County Department of Health and Human Services (the Department) filed a section 300 petition as to A.T., who was a month old, alleging that A.T.'s mother, K.T., had an untreated substance abuse problem that put

A.T. at substantial risk of physical harm, abuse, or neglect. The petition specifically alleged that both K.T. and A.T. had tested positive for cocaine at the time of A.T.'s birth, that K.T. had agreed to voluntary services but had not completed any, and that she had two recent convictions for possession of drug paraphernalia.

The detention report stated that the identity and whereabouts of A.T.'s father were unknown.

Neither K.T., nor anyone claiming to be A.T.'s father, appeared at the detention hearing on September 7, 2007. The juvenile court ordered A.T.'s continued detention in foster care.

The jurisdiction/disposition report dated September 28, 2007, stated that K.T., incarcerated at the Sacramento County jail, had identified R.B., incarcerated at Rio Cosumnes Correctional Center, as A.T.'s father. The report noted that on September 18, 2007, R.B. had been sent notice of the proceedings and had been asked to contact the Department. According to his parole officer, he was facing robbery charges and had several parole violations.

The Department recommended that the juvenile court adjudicate A.T. a dependent of the court, continue his placement in foster care, and offer reunification services to K.T., but not to R.B., whom the Department recommended remain an alleged father.

An addendum report filed on October 26, 2007, indicated that R.B. had been released from custody and given notice of

the proceedings, but the Department had not had any direct contact with him.

At a prejurisdictional status conference on October 31, 2007, R.B. appeared and requested paternity testing. He received appointed counsel at a status conference on November 28, 2007, because he had executed a voluntary declaration of paternity. The juvenile court designated him the presumed father and granted him supervised visitation.

On November 30, 2007, the juvenile court declared R.B. to be A.T.'s presumed parent.

According to another addendum report filed on December 27, 2007, R.B. was arrested and returned to custody on December 8, 2007, on a felony charge of battery with personal injury. He told the social worker that because he was housed in the protective custody unit of the jail as a gang "dropout," he could not presently participate in reunification services. He also said that because the current charge might be treated as his second "strike," he could receive up to 16 years in prison (well beyond the statutory time limit for reunification); even if the charge was not treated as a second strike, he could get up to 11 years; the best sentence he could get would be 32 months. However, because the length of his future incarceration was not yet known, the Department recommended reunification services for him.

On January 2, 2008, the jurisdiction/disposition hearing was held. The juvenile court sustained the section 300 petition.

At the disposition hearing on January 16, 2008, the juvenile court found A.T. to be a dependent of the court and ordered his continued placement in foster care. The court also ordered that both parents receive reunification services, but that no visitation occur while they were in custody.

The Department's permanency report dated April 29, 2008, noted that because of R.B.'s incarceration he had not had any visitation with A.T. The jail social worker told the Department (as R.B. had said before) that R.B.'s classification as a gang "dropout" and protective custody status barred him from participating in reunification services or contact visits with A.T. However, R.B. contacted the Department in late March 2008 and stated that he was trying to have his classification changed so he could participate in services. It was unlikely that reunification services could succeed for R.B. (K.T. had also failed to participate in services while in custody, though they had been available to her.) The Department recommended that the juvenile court terminate reunification services for both parents and order a permanent plan of adoption.

At the contested permanency hearing on August 8, 2008, R.B. testified that on July 7, 2008, he had been transferred to Deuel Vocational Institute, where he could participate in reunification services, and had done so; he could also now receive contact visitation with A.T. He expected to be released from custody on his parole violation on November 21, 2008. (He did not testify as to the disposition of his felony battery

charge.) He had sent a request for visitation to the social worker on or after July 14, 2008.[1]

The juvenile court found that returning A.T. to his parents' custody would be detrimental to him and there was no substantial probability he could be returned to them within the next six months. Accordingly, their reunification services were terminated and the matter was set for a section 366.26 hearing. Pending the completion of a visitation assessment, the parents were not to be allowed visitation.

In a progress report on the visitation assessment, the Department stated: "While . . . contact visits would allow for the father to interact with the child, it is of concern that the child has never had any prior contact with the father as the father has been unavailable while incarcerated at Sacramento County New Main Jail and Rio Cosumnes Correctional Center, and the father failed to participate in visitation during the period he was not in custody. [¶] Due to the fact that neither parent is involved in Family Reunification Services at this time and neither parent has maintained regular contact with the child in over six months, *visitation would not be appropriate for the child at this time as the child does not have a relationship with the parents and would have minimal benefit from being*

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[1] The social worker testified that she mailed R.B. a letter in June 2008, in care of the Rio Cosumnes Correctional Center. R.B. never told her he had been transferred to Deuel Vocational Institute. She had not received any request for visitation from him, in written or oral form, on or after July 14, 2008.

removed from the comfort and familiarity of his foster home in order to participate in these visits." (Italics added.) The Department recommended maintaining the existing no-visitation order.

At the progress report hearing (§ 365) held on September 19, 2008, the juvenile court ordered, over the parents' objection, that the existing no-visitation order remain in effect "[b]ased on the information in this report."

DISCUSSION

"In any case in which the court orders that a hearing pursuant to Section 366.26 shall be held, it shall also order the termination of reunification services to the parent or legal guardian. *The court shall continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds that visitation would be detrimental to the child. . . .*" (§ 366.21, subd. (h), italics added.)

We review the juvenile court's discretionary orders for abuse of discretion and reverse only if the court abused its discretion by making an arbitrary, capricious, or patently absurd determination. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

R.B. contends that the juvenile court applied the wrong standard in denying him visitation. We conclude any error was necessarily harmless.

As section 366.21, subdivision (h), states, the juvenile court may deny visitation to a parent pending a section 366.26 hearing only if it finds visitation would be detrimental to the

minor. (See also *In re Mark L.* (2001) 94 Cal.App.4th 573, 580.) Here, the court did not make that finding in plain terms. Instead, it adopted the recommendation of the Department's progress report, which expressly found only that visitation would provide "minimal benefit" to A.T.

However, the Department's report impliedly finds detriment to A.T. from visitation with R.B. under the present circumstances. To "remove[] [the minor] from the comfort and familiarity of his foster home" so that he may be taken to visit a parent with whom he "does not have a relationship" (in effect, a stranger) in state prison would foreseeably be detrimental to the minor. Thus, the record supports the juvenile court's implied finding of detriment to A.T.

R.B. asserts that a finding of detriment from visitation requires evidence that the parent has seriously harmed or injured the minor. But section 366.21, subdivision (h), does not require such a showing on its face, and the decisions R.B. relies on do not purport to so limit the juvenile court's discretion. (*In re Daniel C.H.* (1990) 220 Cal.App.3d 814, 838-839; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1238.) Therefore we will not read that condition into the statute.

R.B. points out that even a parent who has been convicted of first degree murder of the other parent may have visitation with his or her child under certain conditions. (Welf. & Inst. Code, § 362.1, subd. (a)(1)(B); Fam. Code, § 3030, subd. (c).) But Welfare and Institutions Code section 362.1, subdivision (a), applies at a stage of the dependency proceedings in

which a parent may still regain custody of a minor or receive reunification services, and Family Code section 3030 applies to dissolution proceedings, not dependency proceedings. Thus, neither is relevant here.

Finally, R.B. asserts that the no-visitation order will prejudice him at a future section 366.26 hearing because the lack of visitation will substantially diminish his ability to oppose the termination of parental rights by establishing the beneficial parent-child relationship exception to adoption. (§ 366.26, subd. (c)(1)(B)(i).) Since we have found that the trial court did not abuse its discretion in making the no-visitation order, we need not consider R.B.'s claim of prejudice. In any event, since R.B. has never acted as a parent to A.T., there is no possibility that allowing visitation at this point would enable him to establish the existence of a beneficial parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(B)(i).

DISPOSITION

The juvenile court's no-visitation order is affirmed.

SIMS, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.